covery can be had against a lunatic, upon a contract express or implied, unless for necessaries. Seaver *vs.* Phelps, *supra;* Fitzgerald *vs.* Reed, 9 Sm. & Marshall; Pearl *vs.* McDowell, 3 J. J. Marsh. 658; 2 Greenl. Ev. § 369; Lincoln *vs.* Buckmaster, *supra.*

The rule in regard to instituting legal proceedings against a lunatic is much the same as that which obtains in the case of infants; and there would seem to be more reason for a strict enforcement of it in the former case than in the latter, since infants, long before they get out of their nonage, are entirely competent to select counsel, and conduct the defence of a suit.

This subject is very elaborately discussed by WOODBURY, J., in Lang *vs.* Whidden, 2 N. H. R. 435, where the authorities, prior to that date (1822), will be found very extensively quoted, and the subject very learnedly discussed, and satisfactorily disposed of by the court. It is here said the guardian must be notified, in all cases, or the judgment will be erroneous.

The same rule has been adopted in many of the American States. Aldridge *vs.* Montgomery, 9 Ind. R. 302; Snowden *vs.* Danbury, 11 Penn. St. R. 522; 2 Barb. Ch. R. 387; Wright's Appeal, 8 Barr 57; 6 B. Mon. R. 239. But if one who is a lunatic be arrested or imprisoned in a civil suit, he is not entitled to his release on that account. A guardian *ad litem* may be appointed, and the suit proceed. Bush *vs.* Pettibone, 4 Comst. R. 300; Aldrich *vs.* Williams, 12 Vt. R. 413.

There seems to be no good ground to question the decision in the principal case. The same rule has long been established in regard to judgments rendered against infants, without the appointment of guardians *ad litem.* 2 Saund. R. 212, n. 4; Castlemain *vs.* Moody, 4 B. & Ad. 90; see also Mason *vs.* Dennison, 15 Wendell 64; Wead *vs.* Marsh, 14 Vt. R. 77; Crockett *vs.* Drew, 5 Gray 399.

I. F. R.

In the Supreme Court of the State of New York, Oct. 22, 1862.

THE PEOPLE *ex rel.* THE HANOVER BANK *vs.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK.

[Before Ingraham, Barnard, and Clerke, Js.[1]]

1. By the second section of the Act of Congress, passed February 25, 1862, it is provided that "All stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations within the United States, shall be exempt from taxation by or under State authority." The effect of this sec-

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[1] We owe this case to the courtesy of INGRAHAM, P. J., for which he will accept our thanks.—EDS.

tion is to exempt from taxation, under the laws of this State, all stocks, bonds, and other securities issued by the United States after the passage of the act.

2. This Court is bound by the decision of the Court of Appeals, in the case of The People *ex rel.* The Bank of the Commonwealth, 23 N. Y. 192; (1 Am. Law Reg. N. S. 81), as to cases coming within its scope. By force of that decision, securities of a like nature, issued before the passage of the act in question, and owned by a resident of the State, are not exempt from taxation under State laws, if no unfriendly discrimination to the United States, as borrowers, is applied by the State law; and property in United States stock is subjected to no greater burdens than property in general.

3. Congress has no power, by retrospective legislation, to withdraw from State taxation stocks and other like securities, issued by the United States, already subject to such taxation, and so far as the Act of February 25, 1862, exempts, from State taxation, United States securities previously issued, it is extra constitutional and inoperative.

The relators, the Hanover Bank, having a capital of $1,000,000, were assessed at $908,119, the assessors having deducted from the capital the value of the real estate, and stocks in other corporations. The bank objected to this assessment, upon the ground that the bank owned stocks, bonds, and other securities of the United States to the amount of $896,560, and claimed to be entitled to have the amount reduced to $105,000. The Commissioners of Taxes and Assessments refused such application, and the case was brought to this Court on *certiorari*.

Charles Tracy, Esq., for relator.

H. H. Anderson and *Greene C. Bronson*, Esqs., for respondents.

By the Court.

INGRAHAM, P. J.—So far as the questions involved in this case were discussed and decided by the Court of Appeals, in the case of *The People ex rel. The Bank of the Commonwealth*, 23 N. Y. Rep. 192, we do not feel at liberty to express any opinions at variance therewith. That case must be understood as deciding that stock of the United States held by a corporation or by individuals may be taxed under the laws of this State, where such taxation is general as applying to all personal property, and no unfriendly discrimination to the United States stock is applied by the State law, or, in other words, that where the taxation was general on the

personal property of an individual or corporation, property which if nominally taxed as stock of the United States could not be taxed, may be included in the general aggregate of property liable to taxation, and the tax thus be imposed.

It is conceded that property exempt from taxation by law must be deducted from the aggregate valuation of personal property thus subject to assessment, and this principle was afterwards settled by the unanimous decision of the Court of Appeals in the *People ex rel. Hoyt* vs. *The Commissioners of Taxes*, 23 N. Y. Rep. 224, in which it was held that the personal property of an individual residing in this State, actually situated in another State or county, is not to be included in the assessment against him. And in the case first cited, DENIO, J., says: "It follows, therefore, from the very language of the statutes, that if the Bank of the Commonwealth has invested a part of its capital paid in, in a stock which is exempt from taxation, such portion is to be excepted from the assessment."

While, therefore, this decision is to be considered as controlling upon the question whether in assessing the aggregate value of the personal estate of an individual or corporation, stock of the United States should be included, still the question which has now been submitted to us formed no part of the matters upon which that Court passed when the subject was before them. A distinction was then taken between the exemption from taxation of these stocks under the provisions of the Constitution, which gave Congress power to borrow money on the credit of the United States, and such exemption if specially enacted by an Act of Congress. The learned Judge says, "It is the Constitution alone which is to be looked to, for Congress has never passed any law on the subject," and the Court expressed no opinion on the question whether Congress could enact a law by which the lenders of money to the government should enjoy the advantages of exemption from State taxation in respect to such loans; but say, "In the absence of any such statute, and resting upon the general grant of power contained in the Constitution, we are of opinion that the claim to be exempt from taxation cannot be allowed to prevail."

Whatever, therefore, may be the individual opinions of the members of this Court on these questions decided by the Court of Appeals, we do not feel at liberty to re-examine them in this case, and the only difference which exists between that case and the present is as to the effect of the provision of the Act of Congress of the 25th February, 1862, which says: "All stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations within the United States, shall be exempt from taxation by or under State authority."

Two questions arise in regard to this enactment—

I. Whether if constitutional such a provision would exempt them under our laws.

And II. Whether Congress can pass such a law limiting and restricting the powers of the State in regard to taxation.

Upon the first point I think there can be little difficulty.

The Act of 1857 expressly excepts from the personal property to be valued and assessed all such part of it as shall have been exempted by law; and DENIO, J., says: "It would be the duty of the assessors to inquire whether any of this property into which the capital had been converted was exempted by law from taxation. The bank is, as a general rule, assessed and taxed for all its property of every kind, but there is an exception as to such part of it as the Constitution and laws of the Union and of the State have, upon special reasons of policy, declared shall be exempted."

There can be no difficulty under this decision, as well as under the statute, of coming to the conclusion that such deduction must be made if the Act of Congress directing the exemption of the United States stocks and bonds from taxation is valid.

The cases which at various times have been decided in the United States Court, *H. McCullough* vs. *State of Maryland*, 4 Wheaton 316; *Weston* vs. *City of Charleston*, 2 Peters 449; *Osborn* vs. *The United States Bank*, 9 Wheat. 738, and others which might be cited—all hold that special taxation against the stock, bonds, or incorporations under the United States laws, was forbidden by the power given to the general government under the constitutional powers conferred upon Congress in connection therewith. To this extent

I consider the decision of the Court of Appeals, before referred to, as going. DENIO, J., takes the distinction between assessing the United States stocks and bonds specifically, and including the value thereof in the valuation of a man's personal estate. He says, "An unfriendly act of legislation which should exclude the federal government from reverting to the money markets of a particular State for loans, though it might not seriously affect the exercise of the borrowing power elsewhere, would be so obviously hostile to the operations of the government that I am confident it could not be sustained." And again (p. 207), "If the federal stock can be taxed separately and specifically at any amount which a State Legislature or a municipality to which its power has been delegated shall see fit, the government, in seeking to obtain money on loan, may be effectually driven out of the markets of such State."

If it be conceded that the right to borrow money by the Congress of the United States, granted by the Constitution, prevents the States from laying a specific tax on such bonds and stocks to an extent that would interfere with the government in borrowing money in such State, it seems to follow that the government must have the right to make such loans on such terms and limitations as they shall deem necessary to make such loans available; and that Congress, in authorizing such loans, is the person that must decide as to the conditions on which the loans may be taken. If the power to borrow involves the power to prevent the States from interfering with such loans by specific taxation, can there be any doubt that Congress may, for the sake of securing such loans, say to what extent, if any, the States may tax the same, and add to the terms on which the stock shall be issued, immunity from taxation throughout the country? If the States cannot impose a specific tax because it would impair the value, and thereby interfere with the power of borrowing, may not Congress say, that neither a specific or general tax shall be imposed by the States, in order to secure the success of the loan?

The power to borrow money and to issue stock is undoubtedly a sovereign power, and embraces within it all necessary powers to carry it effectively into exercise. It cannot be restrained as to

the place throughout the States in which it is to be exercised, nor the terms on which loans are to be made, nor the mode of transfers it may adopt, or the place where they are to be made, nor the exemptions which such stocks shall have from public burdens. If Congress had said no specific tax shall be laid on such stock and bonds in any of the States, the power to do so would be conceded under the decisions of the United States Courts, as well as the Courts of this State. If they can prevent specific taxation, I see no reason why the same power will not enable them to forbid any taxation, if in their judgment such restriction is necessary to carry out the original powers to borrow money. Whether they exercise that power wisely or not, is not for the Courts to inquire. The discretion is with them, the power is with them, and when exercised by them, that exercise of power is within the Constitutional authority "to make all laws which might be necessary or proper to carry into execution such power."

In *The United States* vs. *Fisher et al.*, 2 Cranch 258, the right of Congress to give priority to debts due the United States is claimed under the general powers to make all necessary laws. In that case it was said, "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

The same was said by MARSHALL, C. J., in *McCullough* vs. *State of Maryland:* "If the end be legitimate and within the scope of the Constitution, all the means which are appropriate, which are adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect," and "The degree of its necessity is a question of legislative discretion, not of judicial cognisance;" and, in *Brown* vs. *State of Maryland*, 12 Wheat. 419, it is said, "Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

It must be apparent, then, if Congress has any power to prohibit taxation of their stocks or bonds specifically, or to give any privileges to those who buy the same, the extent to which taxation may be prohibited at all, is an act of discretion, to be exercised by

Congress, and which cannot be the subject of judicial limitation. Legislative discretion should not be restrained by judicial decisions. It is the want of power, and not of discretion in the Legislature, which can be reviewed by the Courts.

If it were necessary to refer to the condition of public matters, as rendering it necessary that the general government should possess every power, to enable them advantageously to borrow money, very urgent reasons could be advanced, to show how necessary is the right to exercise such powers at the present time, to enable them to provide the means for the preservation of the government, but it is not necessary under the views above expressed on these questions.

It is argued, on behalf of the respondents, that even if the Act of February, 1862, is valid, it cannot be made applicable to stocks issued previous to its passage. The ground upon which the exercise of that power by Congress is sustained is, that by such provisions the power of Congress to borrow money is aided, and that to deprive that body of the power to prescribe the terms on which the loan could be made, and the privileges be conferred, therefore, would be to impair the power thus conferred by the Constitution. I am at a loss to see how that necessity exists as to stocks which had been issued and paid for long before its passage. We are controlled by the decision of the Court of Appeals, that, as to all stock issued before the passage of that act, it was subject to taxation with the other property of individuals and corporations. It is, then, presented as a simple statute, in regard to this stock, to exempt it from taxation by the States, passed long after the government had any interest in its value.

Without such interest, I should doubt the power to exempt such stocks, any more than any other property, from taxation. As a declaratory act of the views of Congress; as to their right to exempt stock from taxation, it would be of value, but it would confer no power which Congress did not otherwise possess. If the right to exempt from taxation rests solely on the necessity of the power in order to enable the United States rightly and advantageously to carry out the provision of the Constitution as to borrowing money, such right could not, with propriety, be claimed in regard to stocks

which had long before been issued, and the consideration for which had long before been paid over to the government. Such property could with no more propriety be exempted from taxation by an Act of Congress, if such legislation was necessary, than any other property on which taxes might be imposed.

An objection was taken to this proceeding that it was brought too soon, because no taxes had been imposed. The proceedings are against the Commissioners as assessors. Their duty is completed when the assessment is made out. The taxes are imposed by the Board of Supervisors. The proceedings are to correct the assessment, not the imposition of taxes.

It was said that there was no certainty that any tax would be imposed.

Independent of the law which requires such taxes to be imposed equally upon all the property returned as liable to taxation, it can hardly be supposed even within the bounds of possibility, that an individual or corporation returned as having large amounts of personal property subject to taxation would not at the present day find a sufficient amount of taxes imposed thereon.

My conclusions are—

I. That under the decision of the Court of Appeals in the matter of The Bank of the Commonwealth (23 N. Y. Rep.), stocks and bonds of the United States by a resident of the State may be taxed with other personal estate.

II. That the Act of Congress of February, 1862, exempting such stocks from taxation is valid, so far as relates to all stocks, bonds, and other securities issued by the United States after the passage of the act.

III. That such securities are not subject to taxation under the State laws.

The respondents should be ordered to correct the assessment rolls by striking from the amount the stock, bonds, and securities issued by the United States and held by the relator of a date subsequent to the passage of the Act of Congress.

The case decided by the Court of Appeals, to which reference is made in the principal case, is reported in 1 Am. Law Register, N. S. p. 81. The ques-

tion discussed in these two cases has recently assumed such great importance that a review of them may not be out of place.

I. It will be admitted by all that the powers granted to Congress in the United States Constitution can only be executed by means, or, as it is sometimes termed, by "instruments" or "machinery." None of the great powers conferred in that instrument execute themselves. The power to coin money confers the power to establish a mint as a proper instrument; the power to regulate commerce, the right to establish light-houses, the power to lay taxes, confers the right to provide custom-houses and to appoint collectors and tax gatherers. All these are the instruments and the machinery by which the substantial power is vivified; without them the power is inert; in fact they are a component part of the power granted. For greater caution a clause was inserted in the Constitution that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the powers previously granted; but the better opinion is that no new authority was conferred by this provision. The power to borrow money is no exception to this principle. This can only be exercised by *instruments*—such as government bonds or treasury notes. The government could no more borrow money without them than commerce could be carried on without bills of lading. Such bonds and notes are just as truly the *instruments* of borrowing or of finance as a mint is the instrument by which the power to coin money is exercised, or custom-houses are the means by which the power to collect taxes is carried into effect. It is a mistake then to regard government securities merely as evidences of debt. They are also the means by which the indebtedness is contracted.

II. It is a well settled rule that no instrument or machinery of the general government can be interfered with by the States. No one has been hardy enough to claim that the mint or custom-houses could be taxed by State authorities, or that munitions of war could be taxed even though within the territorial jurisdiction of the State. The early lawyers seem to have been of the same opinion as to evidences of debt issued by the general government. Thus Mr. Hammond of Ohio, in Osburn *vs.* United States Bank, 9 Wheaton 738, arguing *against* the claims of the general government, and insisting that the State authorities could tax the bank, pitched upon this as the best illustration of the class of cases where the States could *not* interfere. He says: "If the nation borrow money, it is competent for the nation to decide upon the evidence to be given of the debt. It would be absurd to subject this national measure to the municipal regulations of one of its parts, and thus permit a part to assess a tax upon the whole." P. 777.

This concession, after the case of McCullough *vs.* Maryland, 4 Wheat. 116, is remarkable as showing that at that time any assertion on the part of the States of the power to tax United States securities was deemed to be untenable. It is believed that a critical examination of the three great cases upon this subject will lead to the same conclusion. They are McCullough *vs.* Maryland, *supra*, Osburn *vs.* United States Bank, and Weston *vs.* City of Charleston, 2 Peters 449. In the first case the facts were, that the Legislature of Maryland enacted that no bank established in that State by any authority other than the State Legislature, should issue any notes except upon stamped paper, to be furnished by the executive of the State at certain specified rates.

A commutation might be made on the part of the bank by paying to the State treasurer a sum mentioned in the act. This law, which embraced the Branch of the United States Bank, situated in Maryland, was alleged by that institution to be unconstitutional. It will be noticed that the tax was laid upon the *notes* of the bank, which were the means by which the bank exercised its powers in behalf of the United States government. It is true that the tax was a special one — that these notes were singled out from other subjects of taxation—but the reasoning of the counsel and of the Court did not proceed upon that ground. It is not easy to perceive why, if the power to tax resides in a State government, it may not select the special objects for taxation at its own discretion, unless hampered by some provision in the *State* Constitution. The power to tax involves the power to discriminate between subjects of taxation. The principles of political economy teach that absolute equality of taxation is often the greatest injustice, and rules are laid down by means of which a proper discrimination may be made. If a discretion exists, the Courts cannot determine whether it is wisely or unwisely exercised. If the Legislature have the power to deliberate and to decide, the conclusion which it reaches is wholly beyond the scope of judicial action. The question, therefore, was discussed upon the broad principle that a State cannot tax the property of the United States, or *the instruments employed in executing its powers.* Thus Mr. Webster cites the clause in the Articles of Confederation which provided "that no impositions, duties, or restrictions should be laid by any State on the property of the United States." He adds: "Is it supposed that property of the United States is now subject to the power of the State governments in a greater degree than under the Confederation?" 4 Wheaton 328. Mr. Hopkinson, one of the counsel for the State, asserted the question before the Court to be whether the bank and its branches could claim *to be exempt from the ordinary and equal taxation of property* as assessed in the States in which they are placed. P. 337. Mr. Pinkney remarked that there must be in this case an implied exception to the general taxing power of the States, because it is a tax upon the legislative faculty of Congress, upon the national property, upon the national institutions. P. 394. And again: "*the Bank of the United States is as much an instrument of the government for fiscal purposes* as the Courts are its instruments for judicial purposes. Though every State may impose a stamp tax, yet no State can lay a stamp tax upon the judicial proceedings or custom-house papers of the United States. But there is no such express exception to the general taxing power of the States contained in the Constitution. It arises from the general nature of the government, and from the principle of the supremacy of the national powers and the laws made to execute them over the State authorities and State laws." p. 396. MARSHALL, C. J., in delivering the opinion of the Court, lays no stress upon the point that this tax was special in its nature, but his opinion proceeds upon the theory that the bank was an *instrument* by which the general government exercised its functions. He stated that the sovereignty of the State in the article of taxtation may be controlled by the Constitution of the United States, and that the question became purely one of *construction* as to the meaning of the Constitution. He added that the means employed by the United States government were given by the people of all the States, and that therefore the people of a single State could not confer a sove-

reignty which will extend over them. As the right never existed, the question whether it has been surrendered cannot arise. He then says: "If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process," &c., p. 432. After explaining some passages in the Federalist, which some had supposed conflicted with these views, and showing that they had been misapprehended, he closed by distinctly holding that the United States Bank was an *instrument* of the government, and the tax was unconstitutional.

It is impossible to read this case with attention without being convinced that the Court intended to place this decision upon the broad ground that the notes of the United States Bank could not be taxed by a State. The fact that the tax was a special one, was subordinate and incidental, and in nowise affected the principle. It is not even alluded to in the opinion. *The case also decided that a note of the United States Bank was an instrument of the United States government.*

A *dictum* occurring at the close of the opinion, has caused some confusion upon this subject. It is remarked by the Court that the opinion does not extend to a tax imposed on the interest which citizens of Maryland may hold in this institution in common with other property of the same description throughout the State. This point was wholly foreign to the case before the Court. If it be good law, the purchase of *stock* in such a corporation by private persons for private purposes bears no analogy to the issue of *notes* by the bank, or *of bonds and notes* by the United States government. The bank stock is issued purely and simply as evidence of property; the notes and bonds are evidences of contracts with third parties, and are the *instruments* by means of which such contracts are made. For a like reason no tax could be laid upon the bank as such, because its efficiency as an instrument of the government might be impaired.

In Osburn *vs.* United States Bank, 9 Wheaton 738, the Court were asked to review their decision previously made in McCullough *vs.* Maryland. No attempt is made by counsel to impugn the argument of the Court in that case. They expressly admit it in all its bearings. They only assail the premises. They urge that the bank is a private corporation, not the instrument of government. If it were, it could not be taxed at all. Mr. Hammond, in this connection, makes the statement in regard to government securities already noticed. The Court affirms the previous decision upon the same principles. It however discusses, somewhat more fully, the doctrine of implied exemption from State authority. It says, "If the sound construction of the Act be that it exempts the trade of the bank as being essential to the character of a machine, necessary to the fiscal operations of the government from the control of the States, Courts are as much bound to give it that construction as if the exemption had been established in express terms." P. 366.

The only question which remains after these decisions, is, to inquire whether the securities of the United States are embraced within the same principle as notes of the United States Bank. If not, we arrive at the conclusion that "notes" of the bank—an instrument of government—cannot be taxed, while "notes" of the government which em-

ploys that instrument may be. But if notes of the bank—the instrument of an instrument—were part of the financial *machinery* of the general government, and thus not taxable, *a fortiori* the notes and bonds of the general government itself are a part of its machinery as being the direct instruments of finance. (We purposely abstain from calling government securities "stock." They are contracts, and nothing more.) It may, however, be said, that the tax in McCullough *vs.* Maryland was levied at the time when the notes were issued by the bank, and that there would be no objection to a tax after the note had come into the hands of a private holder. For a like reason a tax might be laid upon government notes and bonds. It would then be simply a tax upon the property of the owner in the note or bond, and not a tax upon the security itself. The "instrument" of government (the note or bond) would then have spent its force, *as such*, and it would simply be an evidence of property. This question came up before the Court in Weston *vs.* City of Charleston, 2 Peters 449. The City of Charleston, by a local ordinance, had laid a tax of one quarter of one per cent. upon the following species of property: All personal estate, consisting of bonds, notes, insurance stock, six and seven per cent. stock of the United States, or other obligations, upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this State, and stock of the incorporated banks of this State, and the United States Bank excepted.)

It appears, from Mr. Justice THOMPSON'S dissenting opinion, that the ordinance in question was not in full before the Court, but only one clause in it. The fair inference from his statement is, that there were many other articles specified in the ordinance. He objects to the assertion made by a dissenting Judge in the State Court, to which the writ of error was issued, that the tax was upon the United States stock *eo nomine*. This could only mean, he says, that it was enumerated as one description in a *long* list of specified property subject to taxation. The Supreme Court of the United States, however, paid no attention to this incidental point, any more than it did in McCullough *vs.* Maryland, but grappled with the main question, Can the United States securities be taxed by the States at all? The line of argument is, that the right to tax the securities of the United States is the right to tax an instrument used by the government in carrying into effect its acknowledged power to borrow money. Say the Court, "We retain the opinions expressed in McCullough *vs.* Maryland. A contract made by the government, in the exercise of its power to borrow money, &c., is undoubtedly independent of the will of any State in which the individual who lends it may reside, and is undoubtedly an *operation* essential to the important objects for which the government was created." Nor did it make any difference that the stock had been issued before the tax was laid. Mr. Legarè had urged upon the Court, in his argument, that the case came within the exception assumed in McCullough *vs.* Maryland, and that the government securities might be taxed in common with all other private property in the State. P. 462. The Court expressly denied this proposition, and held that the tax on government securities was a tax on the contract—A TAX ON THE POWER TO BORROW MONEY ON THE CREDIT OF THE UNITED STATES. P. 469.

These three cases appear to be in

complete harmony, and are to be regarded as instances of the application of a single principle, which is, that the instruments by which the general government exercises its powers are not subject to State taxation.

The result may be stated in the following propositions:—

1. It must be regarded as well settled upon principle, that the instruments, or machinery by which the United States government exercises its acknowledged powers, are not subject, in any form, to be taxed by the State authorities. They cannot be included in the mass of property which may be taxed, but are altogether exempt, for the reason that that which is created by all the States for the benefit of all, is not subject to the control of any one of them. The right to tax these instruments was never *surrendered* by the States, for it never existed in their favor.

2. The bonds and notes issued by the United States are the instruments or machinery by which the power to borrow is exercised. A tax upon them is "a tax upon the power to borrow money on the credit of the United States."

3. These principles are sustained by the authorities. The first case presented itself simply as a power to *tax the notes* of the United States Bank, and it was held that these were the machinery or instruments by which the general government exercised its financial functions through the medium of a bank, and that they could not be taxed any more than the bank itself. At another time, the question of the right to tax *United States bonds or securities*, after they were issued, came before the Court, and they were also held to be the machinery by which the general government exercised its financial powers. It was not necessary for Congress to exempt them from taxation, for the exemption is implied. They can no more be taxed in the hand of the holder than at the time they are issued. They are issued by the general government for the benefit of all, and cannot be subject to the control of any particular State.

In reaching these conclusions, we regret that they come in conflict with the judgment of the able and enlightened Court which pronounced the opinion in The People *vs.* Commissioners of Taxes, 23 N. Y. 192; S. C. 1 Am. Law Reg. N. S. 81. This case might have caused us to distrust our own reasoning, had it not appeared to us to have the support of the Supreme Court of the United States, the ultimate arbiter of the question. T. W. D.

In the Supreme Court of the State of New York, February General Term, 1862.

JAMES S. KUCHLER *vs.* THE PEOPLE OF THE STATE OF NEW YORK.

1. A statute of the State of New York of 1860, entitled "An act in relation to capital punishment, and to provide for the more certain punishment of the crime of murder," was held by the Court of Appeals, on the one hand, to have repealed absolutely all previous statutes providing for the punishment of murder, and on the other, to be itself unconstitutional in establishing a new mode of